



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2013-0801; FRL-9905-24-Region 8]

Approval and Promulgation of Air Quality Implementation Plans; Colorado; Prevention of Significant Deterioration; Greenhouse Gas Tailoring Rule Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions and additions to the Colorado State Implementation Plan (SIP) submitted by the Colorado Department of Public Health and the Environment (CDPHE) to EPA on May 25, 2011. The proposed SIP revision to Colorado Regulation Number 3 and the Common Provisions Regulation addresses the permitting of sources of greenhouse gases (GHGs). Specifically, we propose to approve revisions to Portions of Parts A, B and D of Regulation Number 3 to incorporate the provisions of the Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule. The proposed SIP revisions establish emission thresholds for determining which new stationary sources and modifications to existing stationary sources become subject to Colorado's PSD permitting requirements for their GHG emissions. EPA is proposing to approve the May 25, 2011 SIP revision to the Colorado PSD permitting program as being consistent with federal requirements for PSD permitting. EPA also proposes to approve several grammar and punctuation changes to Regulation Number 3 made by the State and included in the May 25, 2011 submittal. EPA is proposing this action under the Clean Air Act (the Act or CAA).

DATES: Comments must be received on or before **[insert date 30 days after publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R08-OAR-2013-0801, by one of the following methods:

- Federal Rulemaking Portal: *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- E-mail: *ostendorf.jody@epa.gov*
- Fax: (303) 312-6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- Mail: **Carl Daly**, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop St., Denver, Colorado 80202-1129.
- Hand Delivery: **Carl Daly**, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop St., Denver, Colorado 80202-1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R08-OAR-2013-0801. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through *http://www.regulations.gov* or e-mail, if you believe that it is CBI or otherwise protected from disclosure. The *http://www.regulations.gov* website is an “anonymous

access” system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment along with any disk or CD-ROM submitted. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses. For additional information about EPA’s public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop St., Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jody Ostendorf, Air Program, Mailcode 8P-AR, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop St., Denver, Colorado

80202-1129, (303) 312-7814, ostendorf.jody@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. Information is organized as follows:

Table of Contents

- I. Background for Our Proposed Action
- II. History of EPA’s GHG-Related Actions
- III. EPA’s Analysis of the State’s Submittal
- IV. Proposed Action
- V. Statutory and Executive Orders Review

I. Background for Our Proposed Action

CAA section 110(a)(2)(C) requires states to develop and submit to EPA for approval into the state SIP preconstruction review and permitting programs applicable to certain new and modified stationary sources of air pollutants. There are three separate programs: PSD, Nonattainment New Source Review (NNSR), and Minor NSR. The PSD program is established in part C of title I of the CAA and applies in areas that meet the National Ambient Air Quality Standards (NAAQS) – “attainment areas” – as well as areas where there is insufficient information to determine if the area meets the NAAQS – “unclassifiable areas.” The NNSR program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – “nonattainment areas.” The Minor NSR program (1) addresses construction or modification activities that do not emit, or have the potential to emit, beyond certain major source thresholds and thus do not qualify as “major,” and (2) applies regardless of the designation of the area in which a source is located. EPA regulations governing the criteria

that states must satisfy for EPA approval of the NSR programs as part of the SIP are contained in 40 CFR 51.160 - 51.166.

On May 25, 2011, Colorado submitted revisions for approval by EPA into the Colorado SIP, including some regulations specific to the Colorado NSR PSD permitting program. For Part A, General Provisions Applicable to Reporting and Permitting, the State added new definitions of GHGs and carbon dioxide equivalent (CO₂e), incorporating by reference EPA's global warming potential (GWP) codified via the GHG Mandatory Reporting Rule (Sections I.B.10 and I.B. 23); revise the major source definition so that it applies to regulated NSR pollutants (which includes GHGs) as well as to air pollutants (which does not include GHG), so that GHG is addressed and the definition may be used to establish the mass-based GHG threshold (Section I.B.25.b); and revise annual emission fees to exclude GHGs (Section VI.D). The submittal also adds to Part A a new definition of Subject to Regulation consistent with the "PSD and Title V Greenhouse Gas Tailoring Final Rule" (75 FR 31514, June 3, 2010) hereafter referred to as the "Tailoring Rule" (Section I.B.44). The new definition of Subject to Regulation includes a rescission clause which states, "If there is a change in federal law or the District of Columbia Circuit Court of Appeals or the United States Supreme Court directs or issues an order, which limits or renders ineffective the regulation of GHG emissions at stationary sources under the NSR PSD or Title V provisions of the Federal Act, the regulation of GHG emissions under the corresponding programs in this Regulation Number 3 shall be limited or rendered ineffective to the same extent" (Section I.B.44.f). EPA interprets this clause to mean, 1) Colorado will wait for EPA's timely interpretation of a Court action; and, 2) Colorado will provide public notice of any rescission, based on a letter of clarification submitted to EPA on December 12, 2013.

In Part B, Construction Permits, the SIP revises the general permitting requirements to

authorize the issuance of synthetic minor permits for GHGs if stationary sources choose to seek federally enforceable limits for GHGs, if they would otherwise be subject to PSD or Title V permitting programs (Section II.A.4 and II.A.7). In Part D, Major Stationary Source New Source Review (NSR) and Prevention of Significant Deterioration (PSD), the SIP revises the Definitions of “best available control technology” (BACT), “major modification” and “major stationary source” to use the term “regulated NSR pollutant” for consistency with the Tailoring Rule (Sections II.A.8, II.A.22, II.A.24.a, II.A.24.a.(ii) and II.A.24.b); and revise “NSR Pollutant” to be consistent with EPA’s Tailoring Rule (Section II.A.38.e and II.A.38.f).

The SIP also added definitions to Section I.G. of the Common Provisions Regulation to include “greenhouse gas” and “CO₂e,” to be consistent with the federal definitions.

Grammatical and punctuation changes to Regulation Number 3 were made by the State throughout Regulation Number 3 as documented in the May 25, 2011 submittal.

These revisions 1) establish that GHG is a regulated pollutant under Colorado’s NSR PSD program, and 2) establish emission thresholds for determining which new stationary sources and modification projects become subject to Colorado’s NSR PSD permitting requirements for their GHG emissions consistent with the Tailoring Rule. Today’s proposed action presents our rationale for approving these regulations as meeting the minimum federal requirements for the adoption and implementation of NSR PSD SIP permitting programs.

II. History of EPA’s GHG-Related Actions

This section briefly summarizes EPA’s recent GHG-related actions that provide the background for this action. Please see the preambles for the identified GHG-related rulemakings for more information.

Beginning in 2010, EPA undertook a series of actions pertaining to the regulation of GHGs that established the overall framework for today's proposed action on the Colorado SIP. These actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which EPA issued in a single final action,¹ the "Johnson Memo Reconsideration,"² the "Light-Duty Vehicle Rule,"³ and the "Tailoring Rule."⁴ Taken together and in conjunction with the CAA, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subjected GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis. EPA took this last action in the Tailoring Rule, which, more specifically, established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources.

At the same time, EPA recognized that many states had approved SIP PSD programs that do apply PSD to GHGs, but that do so for sources that emit as little as 100 or 250 tons per year (tpy) of GHG, and that do not limit PSD applicability to GHGs to the higher thresholds in the Tailoring Rule. Therefore, EPA issued the GHG PSD SIP Narrowing Rule,⁵ under which, EPA converted its previous full approval of the affected SIPs, including Colorado's, to a partial approval and partial disapproval, to the extent those SIPs covered GHG-emitting sources below

1 "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009).

2 "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17004 (April 2, 2010).

3 "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

4 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31514 (June 3, 2010).

5 "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting Sources in State Implementation Plans," 75 FR 82536 (December 30, 2010).

the Tailoring Rule thresholds. EPA based its action primarily on the “error correction” provisions of CAA section 110(k)(6). Many of those states have since submitted SIP revisions that have established the Tailoring Rule thresholds, and EPA has approved those SIP revisions and rescinded the partial disapprovals.

III. EPA’s Analysis of the State’s Submittal

These revisions to Colorado’s SIP are necessary because without them, and notwithstanding the GHG PSD SIP Narrowing Rule, PSD requirements would apply, as of January 2, 2011, at the 100- or 250-tpy levels provided under the CAA. This would greatly increase the number of required permits, impose undue costs on small sources and overwhelm Colorado’s permitting program. The May 25, 2011 proposed revisions establish thresholds for determining which stationary sources and modification projects become subject to permitting requirements for GHG emissions under Colorado’s NSR PSD program. Colorado is currently a SIP-approved state for the PSD program, and has incorporated EPA’s 2002 NSR reform revisions for PSD into its SIP.

Colorado has adopted and submitted regulations that are substantively similar to the federal requirements for the permitting of GHG-emitting sources subject to PSD. The revisions incorporate the Tailoring Rule into Colorado’s PSD Permitting Programs, and support synthetic minor permitting at stationary sources seeking federally enforceable limits to avoid major source or major stationary source applicability thresholds specific to GHG. The State revisions add the definitions of GHG, CO₂e and subject to regulation, revise the definitions of major source and regulated pollutant, allow for synthetic minor source permitting and make the Tailoring Rule effective January 2, 2011. We propose to conclude that the revisions are consistent with the

requirements of 40 CFR 51.166, in particular requirements set out in EPA's final GHG Tailoring Rule, and that the revisions should be approved into Colorado's SIP.

The cover letter to Colorado's May 25, 2011 submittal identified the specific regulations the State requested that EPA approve into the SIP including grammatical and capitalization changes. The State made these minor changes to Parts A, B, and D of Regulation Number 3. These Parts of Colorado's Regulation Number 3 address the State's permitting and PSD program. However, grammatical changes were also made to Part C of the regulation. Part C is the State's Title V permitting program that is not part of the SIP. Since the State included these non-SIP regulatory changes, EPA is taking no action on changes made to Part C.

IV. Proposed Action

EPA proposes to approve the May 25, 2011 submittal for incorporation into the SIP. Specifically, EPA proposes to approve revisions to Regulation Number 3 Parts A, B and D and the Common Provisions Regulation. EPA has made the preliminary determination that these May 25, 2011 revisions are approvable because they were adopted and submitted in accordance with the CAA and EPA regulations regarding PSD permitting for GHGs.

Minor grammatical and capitalization changes made throughout the May 25, 2011 revisions are proposed for approval. These include minor changes to all sections to the following provisions in Regulation Number 3, Part A, Part B, and Part D. The changes do not revise the regulatory language in Regulation Number 3 and are, therefore, proposed for approval without reference. We are not acting on grammatical revisions to Part C of Regulation Number 3 since this is the State's Title V operating permit program and it is not part of the SIP.

V. Statutory and Executive Orders Review

Under the Clean Air Act, the Administrator is required to approve a SIP submission that

complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law that meets federal requirements and disapproves state law that does not meet federal requirements; when finalized, this action would not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, and Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq*

Dated: December 20, 2013

Howard M. Cantor
Acting Regional Administrator
Region 8